Supreme Court, U.S.
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No. 04-___

IN THE

Supreme Court of the United States

SAMUEL T. POOLE,

Petitioner,

v.

FAMILY COURT OF NEW CASTLE COUNTY, LORETTA M. YOUNG, EMMA HAYES, FLORENCE F. WRIGHT, JOHN W. NAILS, EDWARD J. ZETUSKY, JR., WALTER T. REDAVID, DELAWARE COUNTY BAR ASSOCIATION, AND JOHN DOE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a *pro se* prisoner's untimely notice of appeal, filed within seven days after the prisoner received notice of entry of judgment and drawing attention to the fact that the prisoner acted promptly after receiving notice of entry of judgment, can be construed as a motion to reopen the time to file a notice of appeal under Rule 4(a)(6) of the Federal Rules of Appellate Procedure?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Samuel T. Poole respectfully seeks a writ of certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 368 F.3d 263 (3d Cir. 2004), and appears in this Petition's Appendix ("Pet. App.") at 1a-12a. The court of appeals' first order denying the petition for rehearing and rehearing *en banc* appears at Pet. App. 23a-24a. The amended order denying the petition for rehearing and rehearing *en banc* appears at Pet. App. 25a-26a. The opinion of the district court is unreported and appears at Pet. App. 13a-22a.

JURISDICTIONAL STATEMENT

The court of appeals entered its decision on May 13, 2004. The court of appeals denied the petition for rehearing and rehearing *en banc* on June 8, 2004, in an order indicating that Judge Friedman, who had sat by designation on the panel, would have granted panel rehearing. An amended order, dated June 15, 2004, removed the reference to Judge Friedman's having voted for panel rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The full text of Rule 4(a) of the Federal Rules of Appellate Procedure appears at Pet. App. 29a-32a. Rule 4(a)(6), which is of particular relevance here, provides:

> (6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
>
> (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the

moving party receives notice of the entry, whichever is earlier;

(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and

(C) the court finds that no party would be prejudiced.

STATEMENT

This case presents an important and recurring question of federal law that has divided the courts of appeals. Federal Rule of Appellate Procedure 4(a)(6) authorizes federal district courts to reopen the time for appeal in cases in which the would-be appellant has not received notice within 21 days after entry of judgment. This case presents the question whether a *pro se* plaintiff's untimely notice of appeal, filed with seven days after the plaintiff received notice of entry of judgment and mentioning the late receipt, can be construed as a motion to reopen the time for appeal under Rule 4(a)(6).

In the decision below, the Third Circuit held that Rule 4(a)(6) requires the filing of a formal motion and that a notice of appeal can never suffice. The court acknowledged that the Eleventh Circuit has taken precisely the opposite view—at least in those cases in which a *pro se* plaintiff files a notice of appeal that mentions late receipt of notice of entry of judgment. The court failed, however, to notice that the established practice in the circuits is much more heavily to the contrary than a single reported decision from the Eleventh Circuit might suggest. The First, Second, Fourth, and Tenth Circuits have all sided with the Eleventh Circuit, and the District of Columbia Circuit has suggested that it would consider treating a *pro se* filing as a Rule 4(a)(6) motion if the filing made clear that timeliness was an issue. The Ninth Circuit has taken an intermediate position; it

ordinarily requires a formally noticed motion but permits district courts to dispense with that requirement at their discretion.

And the split may be even wider than that. The issue is not one that is likely to produce many published opinions. A court of appeals confronts the question only if the would-be appellant knows enough to mention in his notice of appeal that he received notice of entry of judgment late, but not enough to file a formal Rule 4(a)(6) motion. By definition, then, these would-be appellants—typically *pro se* prisoners, if petitioner's research is any indication—are not going to be in a position to argue about the intricacies of Rule 4(a)(6). While a court of appeals could choose to respond to an untimely notice of appeal by launching, *sua sponte*, into an extended discussion of Rule 4(a)(6), the more likely response is a remand to the district court with brief instructions to consider whether the would-be appellant can satisfy Rule 4(a)(6) or a curt dismissal on timeliness grounds. And, indeed, several of the decisions discussed below are short unpublished orders.

The issue is, however, no less important and recurs no less frequently for that. Quite the contrary, the fact that many decisions are likely to be unpublished suggests that the cases petitioner discusses below represent the tip of the iceberg. And what is at stake in these cases is nothing less than access to the courts of appeals, which for many litigants means access to justice. The divide among the circuits on this point is a real one, with real consequences for a large pool of litigants. This Court should act now to establish a single rule for the entire country.

The Federal Rules of Appellate Procedure

Federal Rule of Appellate Procedure 4(a) deals with the timing of appeals in civil cases. Rule 4(a)(1)(A) requires the filing of a notice of appeal "with the district clerk within 30 days after the judgment or order appealed from is entered."

Before 1991, Rule 4(a) provided just one way for a party to seek relief from the ordinary time limit. Rule 4(a)(5) authorized (and still authorizes) a party to move within 30 days after the Rule 4(a)(1) time limit has expired for an extension of the time in which to file an appeal. A party seeking relief under Rule 4(a)(5) must show "excusable neglect or good cause."

The Advisory Committee recognized, however, that Rule 4(a)(5) could be too "strict" in cases in which a party missed the deadline because he or she did not receive notice of entry of judgment in time. Rule 4(a)(6) was added in 1991, along with companion amendments to Federal Rule of Civil Procedure 77(d), "to permit district courts to ease strict sanctions now imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry of a judgment." Fed. R. Civ. P. 77 advisory committee's note. Rule 4(a)(6) authorizes a party who does not receive notice of entry of judgment in a timely fashion to move in the district court to reopen the period for filing an appeal.

There are four elements that a party must satisfy to qualify for relief under Rule 4(a)(6). First, the party must establish that he or she was entitled to notice of entry. Second, the party must establish that he or she did not receive notice from the district court, the district clerk, or any party within 21 days of entry. Third, the party must establish that no other party will be prejudiced by the extension. The Advisory Committee has explained that "prejudice" means "some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal." Fed. R. App. P. 4 advisory committee's note. Fourth, the party must show that he or she submitted a motion within 180 days of entry or within seven days of receipt of notice of entry, whichever is earlier. If each of the four elements is met, the district court may reopen time for appeal for a period of 14 days from the date of entry of the order granting the motion.

See Fed. R. App. P. 4(a)(6); *see also* 20 James W. Moore, *Moore's Federal Practice* §304.14[3] (3d ed. 1999).

The Present Action

Petitioner Samuel Poole filed this action on May 4, 2001, while incarcerated in Smyrna, Delaware. His "Petition for Writ of Habeas Corpus" alleged that several public officials involved in two family court proceedings interfered with his right of access to his son—violating his Fifth and Fourteenth Amendment rights. The District Court construed the petition as a complaint filed under 42 U.S.C. § 1983. Pet. App. 13a.

On March 24, 2002, Poole was transferred from the Smyrna, Delaware prison to one in Graterford, Pennsylvania. Two days later, the district court *sua sponte* entered an order dismissing the claims as to two of the defendants for lack of personal jurisdiction, and dismissing the remaining claims as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1). Pet. App. 21a-22a.

Unaware of Poole's new address—despite the fact that Poole had earlier sent the district court a note bearing his new address—the district court clerk mailed notice of entry of judgment to the Delaware prison in late March 2002. The letter was not returned to the clerk as undeliverable until April 24, 2002—29 days after it was first mailed. Upon receiving the returned notice, the clerk promptly requested a new address from the Department of Corrections and on April 29, 2002, mailed notice of entry to Poole at the prison in Graterford, Pennsylvania. Pet. App. 3a.

Poole received notice of entry of judgment on May 6, 2002. He filed his notice of appeal three days after receiving the notice, on May 9, 2002, which was within the period allowed by Rule 4(a)(6) for a motion to reopen. In his notice of appeal, Poole used underlining to draw particular attention to the fact that he did not receive notice of entry of judgment until May 6, 2002. Pet. App. 40a.

The Third Circuit's Decision

On May 13, 2004, the Third Circuit issued its decision dismissing Poole's appeal. The court found that it "lacked jurisdiction" to entertain the appeal and declined to grant Poole relief under Rule 4(a)(6).

Noting that Rule 4(a)(1) generally requires a notice of appeal to be "filed with the district court within 30 days after the judgment or order appealed from is entered" the court determined that Poole had filed his notice of appeal 44 days after the entry of judgment, and thus out of time. Since "[t]he timeliness of an appeal is a mandatory jurisdictional prerequisite," Pet. App. 2a, and Poole was not entitled to tolling under a Third Circuit doctrine that extends the appeal period for *pro se* prisoners under certain limited circumstances, Pet. App. 3a-6a, the court concluded that it would lack jurisdiction to hear the appeal unless Poole was entitled to seek relief under Rule 4(a)(6), Pet. App. 6a.

Poole received notice on May 6, 2002, and therefore had until May 13, 2002 to move to reopen the time for appeal under Rule 4(a)(6). Poole filed his notice of appeal during that seven-day period. The question for the court was therefore whether it could possibly "construe his notice of appeal as a motion to reopen." Pet. App. 7a.

The court answered that question in the negative. It reasoned that Rules 4(a)(5) and 4(a)(6) should receive parallel constructions. Because the Third Circuit has interpreted Rule 4(a)(5) as requiring a formal motion and not just a notice of appeal, the court concluded that Rule 4(a)(6) requires a formal motion as well. Pet. App. 7a-9a.

The court acknowledged that its decision was in direct conflict with the Eleventh Circuit's decision in *Sanders v. United States*, 113 F.3d 184 (11th Cir. 1997) (per curiam), and stated that it did not find that court's reasoning persuasive. In particular, the Third Circuit panel rejected the

Eleventh Circuit's arguments that Rule 4(a)(6) is less strict than Rule 4(a)(5) and that *pro se* submissions should receive a more liberal construction than ordinary submissions. The court also dismissed the *Sanders* court's concern that prison officials may act to prevent prisoners from receiving notice until after the time to appeal has expired, calling the scenario an "extreme hypothetical." Pet. App. 9a-11a.

Despite that, the Third Circuit allowed that its holding "may lead to harsh results under both rules, and it may be that it would be preferable to treat a *pro se* notice of appeal as a motion under both rules." The court felt itself bound, however, to read "Appellate Rules 4(a)(5) and 4(a)(6) ... consistently" in light of existing circuit precedent, and therefore declined to endorse the less "harsh" and possibly "preferable" result. Pet. App. 11a.

The court accordingly concluded that Poole's notice of appeal was not timely filed and dismissed the appeal for lack of jurisdiction. Pet. App. 12a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF AT LEAST FIVE OTHER COURTS OF APPEALS.

The Third Circuit's decision directly conflicts with decisions of the First, Second, Fourth, Tenth, and Eleventh Circuits. Those courts have held that a *pro se* prisoner's late notice of appeal may be construed as a Rule 4(a)(6) motion to reopen the time to appeal—at least in those cases in which the notice of appeal draws some attention to the timeliness problem. The D.C. Circuit has suggested that under appropriate circumstances, it might accept a *pro se* notice of appeal as a motion to reopen. While no other court of appeals has adopted the Third Circuit's "harsh" position, the Ninth Circuit has held that Rule 4(a)(6) ordinarily requires a formal motion, subject to the district court's discretion.

As noted above, the Third Circuit recognized that it was creating a conflict, although it did not appreciate the conflict's full extent. A large portion of the decision below addresses the Eleventh Circuit's decision in *Sanders v. United States*, 113 F.3d 184 (11th Cir. 1997) (per curiam). Sanders, proceeding *pro se*, sought to appeal the district court's denial of his habeas petition. In his notice of appeal, he stated that he did not receive the district court's order until after the Rule (4)(a)(1) deadline had passed. *See id.* at 186. The court of appeals initially dismissed Sanders's appeal for lack of jurisdiction.

Sanders asked the court to reconsider, and upon reconsideration, the court vacated its earlier order and construed the late notice of appeal as a motion to reopen the time for appeal pursuant to Rule 4(a)(6). The court held that if Sanders could prove his allegations of having received notice of entry of judgment late, the most appropriate means of obtaining an extension would be through Rule 4(a)(6), not Rule 4(a)(5). The court noted that there are "powerful reasons" to permit the reopening of time to appeal "when a *pro se* litigant files a late notice of appeal because he did not receive notice of the entry of the order or judgment from which he seeks to appeal." 113 F.3d at 187. The court explained that because Rule 4(a)(6) was added to the Federal Rules of Appellate Procedure to create "more liberal provisions for extension of time" where a litigant has received notice of entry of judgment late, it makes sense that potential Rule 4(a)(6) motions should be treated "differently" and "more favorably" than potential Rule 4(a)(5) motions. *Id.* The court emphasized that if it dismissed Sanders's claim, he would be shut out from any chance to appeal the district court's order through no fault of his own. The court also expressed concern that denying a *pro se* prisoner any relief from prison delay would leave prison officials able to block access to appellate courts by slowing the delivery of mail. These reasons, combined with the duty liberally to construe *pro se* pleadings, led the court to hold that "when a

pro se appellant alleges that he did not receive notice of the entry of judgment . . . within twenty-one days of its entry, we must treat his notice as a Rule 4(a)(6) motion." *Id.* The panel remanded the case to the district court with instructions to determine whether Sanders satisfied Rule 4(a)(6)'s requirements.

The circuit split extends, however, well beyond the Third and Eleventh Circuits. The Tenth Circuit, like the Eleventh, is on record in a published decision as holding that an untimely notice of appeal can be construed as a Rule 4(a)(6) motion to reopen the time to appeal. In *Ogden v. San Juan County*, 32 F.3d 452 (10th Cir. 1994), the plaintiff, proceeding *pro se*, attempted to appeal the dismissal of his § 1983 action. Ogden filed a late notice of appeal in which he noted that he did not receive notice of the district court's order dismissing the case. The Tenth Circuit found that "by proffering an excuse, the plaintiff appeared to recognize he had a timeliness problem" and therefore the court "liberally construe[d] the notice of appeal as a motion to reopen for appeal pursuant to Fed. R. App. P. 4(a)(6)." *Id.* at 454.

The Tenth Circuit has consistently applied this interpretation. In *United States v. Dodds*, 1994 U.S. App. LEXIS 33673 (10th Cir. 1994), the district court clerk sent the *pro se* plaintiff's copy of the order to the wrong address, resulting in an untimely appeal, as in the present case. In allowing the appeal, the court explained, "[b]ecause Defendant recognized that he had a timeliness problem, we liberally construe Defendant's notice of appeal as a motion to reopen the time for appeal pursuant to Rule 4(a)(6)." *Id.* at *3; *see also United States v. Muldrow*, No. 99-3357 (10th Cir. Apr. 13, 2000) ("Because Defendant recognizes he has a

timeliness problem, we liberally construe his notice of appeal as a motion under Fed. R. App. P. 4(a)(6).").[1]

When unpublished decisions and orders are taken into account, it emerges that several other circuits have construed untimely notices of appeal as Rule 4(a)(6) motions.

The First Circuit has directed a district court to treat a *pro se* plaintiff's untimely notice of appeal as a motion to reopen the time for appeal. *See Abreu v. United States*, 1999 U.S. Dist. LEXIS 2690, at *1 (D.R.I. Feb. 4, 1999) ("[I]n remanding this matter to the district court, the First Circuit intends that the *pro se* petitioner's notice of appeal be considered as a motion made pursuant to Fed. R. App. P. 4(a)(6).").

The Second Circuit has several times instructed district courts to construe a *pro se* plaintiff's untimely notice of appeal as a motion to reopen the time for appeal. In *Martinez v. Scully*, No. 94-2190 (2d Cir. May 6, 1994), the court of appeals remanded to the district court with instructions "to determine when petitioner received a copy of the judgment and to treat appellant's notice of appeal as a motion to extend the time for appeal under Fed. R. App. P. 4(a)(6)." *See Martinez v. Scully*, 1995 U.S. Dist. LEXIS 7430, at *1-*2 (S.D.N.Y. May 31, 1995) (quoting Second Circuit's order). Similarly, in *Powless v. Grose*, No. 96-2091 (2d Cir. Mar. 22, 1996), the court of appeals instructed the district court "to construe the appellant's notice of appeal as a motion to reopen the time for appeal pursuant to Fed. R. App. P. 4(a)(6)." *See Powless v. Grose*, 1996 U.S. Dist.

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[1] The Tenth Circuit's order in *Muldrow* is reproduced at Pet. App. 37a-39a.

LEXIS 10694, at *2-*3 (N.D.N.Y. July 18, 1996) (noting Second Circuit's order).[2]

The Fourth Circuit has consistently held that where "a *pro se* appellant filed an untimely notice of appeal offering some excuse for untimeliness, that notice is properly construed as a motion to reopen the time to note an appeal under Fed. R. App. P. 4(a)(6)." *United States v. Akinkoye*, 16 Fed. Appx. 179, 180 (4th Cir. 2001). In *United States v. Blakely*, 97 Fed. Appx. 453, 454 (4th Cir. 2004), the would-be appellant, acting *pro se*, sought to appeal the denial of a motion but did not file the notice of appeal until after the allotted time. The Fourth Circuit allowed the appeal: "Blakely's *pro se* motion to extend and notice of appeal, in which she alleged that she did not timely receive notice of her action being dismissed, may be properly construed as a motion to reopen the time to note an appeal." *Id.* at *2. The court remanded to the district court with instructions to determine whether Blakely's notice met the requirements of 4(a)(6). In *Buckley v. Freund*, 22 Fed. Appx. 185, 186 (4th Cir. 2001), the court found that a motion titled "motion notice appeal," in which the appellant requested that his late appeal be accepted, qualified as a motion for extension "due to Buckley's expressed desire to pursue his appeal." The Fourth Circuit addressed this issue again recently in *United States v. Gray*, 2004 U.S. App. LEXIS 10077 (4th Cir. May 21, 2004). Gray sought to appeal a district court order denying relief on his motion filed under 28 U.S.C. § 2255. Gray's appeal was untimely, but since Gray stated in his notice of appeal that he did not receive notice of the order, the court "construe[d] Gray's statement as a motion to reopen the time to note an appeal under Fed. R. App. P. 4(a)(6)." *Id.* at *2.

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[2] The Second Circuit's orders in *Martinez* and *Powless* are reproduced at Pet. App. 33a-34a and Pet. App. 35a-35a, respectively.

Finally, the D.C. Circuit has cited the Eleventh Circuit's *Sanders* decision in a way that suggests a willingness to construe a notice of appeal as a Rule 4(a)(6) motion to reopen in an appropriate case. *See United States v. Feuver*, 236 F.3d 725, 728-29 & n.7 (D.C. Cir. 2001). The court did not have to decide the question, however, because it was impossible to construe the filing at issue in *Feuver*—a "Motion for Determination of Status" that did "not even mention the word 'appeal'"—as a motion to reopen. *Id.* at 729. *But cf. Kidd v. District of Columbia*, 206 F.3d 35, 38 (D.C. Cir. 2000) (noting that Rule 4(a)(6), like Rule 4(a)(5), "requires a motion asking the district court to reopen the time for appeal").

Although no other court of appeals has taken the Third Circuit's "harsh" position, the Ninth Circuit has held that Rule 4(a)(6) ordinarily requires "noticed motions," not "informal application[s]." *Nunley v. City of Los Angeles*, 52 F.3d 792, 795 (9th Cir. 1995). The court also held, however, that district courts have broad discretion to dispense with service requirements and the like, and accepted an *ex parte* application that failed to mention Rule 4(a)(6) as a motion to reopen, noting that "we will not rigidly deny . . . review under the authority of Rule 4(a)(6)." *Id.* at 794 n.4. Accordingly, it is not clear how the Ninth Circuit would answer the question presented today.

In sum, with the Third Circuit's decision in this case, the courts of appeals are now squarely divided over whether a *pro se* litigant's untimely notice of appeal may be construed as a motion to reopen.

II. THE DECISION BELOW MISCONSTRUES RULE 4(a)(6).

The Third Circuit's interpretation of Rule 4(a)(6) is mistaken.

First, the Rule's text shows that the Third Circuit was mistaken to require strictly parallel readings of the "motion" requirement in Rules 4(a)(5) and 4(a)(6). Rule 4(a)(5) is a general provision providing for the extension of the time to file a notice of appeal where the would-be appellant can show "excusable neglect or good cause." By its nature, a showing of excusable neglect or good cause requires some detail—more detail than appears in a notice of appeal. Rule 4(a)(6), by contrast, is a specific provision designed to address the situation in which a would-be appellant has filed a notice of appeal out of time because he or she did not receive notice within 21 days after entry of judgment. A showing of late receipt is much more straightforward than a showing of excusable neglect or good cause, and is the sort of a thing that a party can easily include in a notice of appeal, as the notices filed in this case and the cases discussed in Part I above illustrate. Indeed, the Ninth Circuit has held that a party seeking relief under Rule 4(a)(6) need only "specifically den[y] receipt of notice" to trigger the rule. *Nunley*, 52 F.3d at 796. Accordingly, it is reasonable to suppose, as courts in the First, Second, Fourth, Tenth, and Eleventh Circuits have, that a notice of appeal can satisfy the requirements of Rule 4(a)(6) without necessarily being able to satisfy the requirements of the more demanding Rule 4(a)(5).

Second, the Third Circuit's interpretation of Rule 4(a)(5) and 4(a)(6) as equally strict is fundamentally at odds with Rule 4(a)(6)'s purpose. As the Second Circuit has observed, "[t]he purpose of subdivision (6) [of Federal Rule of Appellate Procedure 4(a)] was to relieve parties of the rigors of subdivision (5) when the failure to timely appeal was caused by not having received notice of the entry of judgment." *Avolio v. County of Suffolk*, 29 F.3d 50, 53 (2d Cir. 1994). The Advisory Committee notes confirm this reading—Rule 4(a)(6) was added to the Appellate Rules in 1991, along with companion amendments to Federal Rule of Civil Procedure 77(d), "to permit district courts to *ease strict*

sanctions now imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry of a judgment." Fed. R. Civ. P. 77 advisory committee's note (emphasis added). Given this history, it makes sense to conclude, as the majority of circuits to have considered the question have done, that Rule 4(a)(6) requires less in the way of formality than Rule 4(a)(5). By requiring the filing of a formal motion to extend the time for appeal, the decision below runs contrary to Rule 4(a)(6)'s purpose of relaxing Rule 4(a)(5)'s strictures and providing relief to parties who did not receive notice of entry of judgment.

Third, even if there were some reason to regard Rule 4(a)(5) and Rule 4(a)(6) as exactly alike, the better approach would be to treat appropriately worded *pro se* notices of appeal as motions under *both* provisions. That approach would accord with the well-recognized principle that a *pro se* plaintiff's pleadings are held "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *see also Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (discussing the requirement to "[c]onstru[e] petitioner's inartful pleading liberally"). Indeed, the court below hinted at this outcome when it allowed that its "interpretation may lead to harsh results under both rules [4(a)(5) and 4(a)(6)], and *it may be that it would be preferable to treat a* pro se *notice of appeal as a motion under both rules.*" Pet. App. 11a (emphasis added).

Fourth, and relatedly, the Third Circuit's approach exalts form over substance. Samuel Poole's notice of appeal was unquestionably a plea to the court to accept the untimely appeal and consider the fact that he did not receive notice of entry of judgment until after the time to appeal had passed; the May 9, 2002 notice used underlining to draw attention to the fact that Poole had received notice of entry only three days earlier, on May 6. Pet. App. 40a. The only difference between Poole's notice of appeal and a motion satisfying the Third Circuit's standard is a caption at the top reading

"Motion to Reopen Under Rule 4(a)(6)." To deny anyone—let alone a *pro se* plaintiff—his day in the court of appeals based on such a slender distinction, and to do it in a case in which the would-be appellant filed late through no fault of his own, is the clearest sort of injustice.

Fifth, following the Third Circuit's approach would allow prison officials to block prisoners' access to the courts by ensuring that they do not receive notice of an adverse decision until after the time provided by Rule 4(a)(1). The Third Circuit dismissed this as an "extreme hypothetical," Pet. App. 11a, but in fact a variant of this "extreme hypothetical" led this Court to create a special rule for assessing the timeliness of a *pro* se prisoner's notice of appeal. In *Houston v. Lack*, 487 U.S. 266 (1988), this Court adopted a "mailbox rule" for determining when a *pro se* prisoner submits his notice of appeal. Under the mailbox rule, the notice is deemed filed at the moment the prisoner gives it to prison authorities for mailing. *See id.* at 276. Among other things, the Court was worried about the fact that a *pro se* prisoner has no choice but to entrust the sending and receipt of his mail to prison authorities, "whom he cannot control or supervise and who may have every incentive to delay." *Id.* at 271. This is essentially the same concern the Third Circuit dismissed as an extreme hypothetical; the only difference is that in *Houston v. Lack*, the concern was delay in getting mail from the prisoner to the postal service, whereas here the concern is delay in delivering mail from the postal service to the prisoner. If the one concern was serious enough to trouble this Court in 1988, the other ought to have been serious enough to trouble the Third Circuit in 2004.

III. THE DECISION BELOW INVOLVES AN IMPORTANT AND RECURRING ISSUE OF FEDERAL LAW THAT MERITS IMMEDIATE REVIEW

This court's review is appropriate not only to remedy the erroneous decision below, but also to prevent unjust denial of access to the courts and maintain the uniformity of the Federal Rules of Appellate Procedure.

Access to the courts of appeals is a critically important issue. In this case, for example, petitioner is seeking to vindicate his constitutional right to associate with his son. Pet. App. 2a. The district court made an elementary error in acting *sua sponte*, before the complaint was even served, to deny Poole's claims against several parties for lack of personal jurisdiction and failure to file within the limitations period. Pet. App. 18a-21a. Both personal jurisdiction and statute of limitations are waivable affirmative defenses, and therefore cannot serve as grounds for a *sua sponte* dismissal before the parties have even been served. But Poole will have to live with this error, which sounds the death knell for his constitutional claim, if he cannot win a hearing from the court of appeals. If his claim had arisen anywhere in the First, Second, Fourth, Tenth, or Eleventh Circuits, however, he would have had his hearing and gotten his reversal. This is precisely the sort of inconsistency on a pressing matter that this Court should not tolerate.

In addition, the House Committee on the Judiciary recognized that "uniformity of appellate procedure is urgently needed" when it authorized this Court, in 1966, to prescribe rules governing procedure in the federal appellate courts. H.R. Rep. No. 89-2153 (1966), *reprinted in* 1966 U.S.C.C.A.N. 4171, 4173. Judge Albert B. Maris, in a letter to the Committee, urged that "it is very much in the public interest that uniformity of such procedure be achieved." *Id.* at 4175. The need for uniformity in appellate procedure has not diminished in the interim. On the contrary, as the

number of appeals continues to rise, the need for uniformity also rises. *See, e.g.* Analytical Services Office, Administrative Office of the U.S. Courts, Judicial Facts and Figures Table 1.3 (2003) (reporting that the number of appeals filed has increased from 3,899 in 1960 to 60,847 in 2003).[3]

The issue is also recurring one. As the Advisory Committee noted in 1991, by way of justifying Rule 4(a)(6) and the companion amendments to Federal Rule of Civil Procedure 77(d), "[f]ailure to receive notice may have increased in frequency with the growth in the caseload in the clerks' offices." Fed. R. Civ. P. 77 advisory committee's note. Consistent with this observation, petitioner was able to unearth a dozen decisions and orders discussing how to interpret late notices of appeal in cases like this one. It is likely, however, that those decisions represent just the tip of the iceberg, since orders remanding for further consideration under Rule 4(a)(6) will rarely be published. *See supra* at 3.

In the interest of uniform access to the federal courts of appeals for the many future litigants who will receive late notices from district courts, this Court should grant certiorari and resolve the circuit split.

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[3] Available online at http://www.uscourts.gov/judicialfactsfigures/contents.html.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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September 7, 2004

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2364

SAMUEL T. POOLE, Appellant

v.

FAMILY COURT OF NEW CASTLE COUNTY; JOHN DOE; EMMA HAYES; FLORENCE F. WRIGHT, ESQ.; JOHN W. NAILS, ESQ.; EDWARD J. ZETUSKY, Jr.; WALTER T. REDAVID, ESQ., Judge; DELAWARE COUNTY BAR ASSOCIATION; ROBERT SNYDER, Warden; ATTORNEY GENERAL OF THE STATE OF DELAWARE; LORETTA M. YOUNG

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

(Dist. Court No. 01-cv-00297)
District Court Judge: Hon. Joseph J. Farnan, Jr.

Argued Dec. 2, 2003.

Before: SLOVITER, ALITO, and FRIEDMAN,* Circuit Judges

(Opinion Filed: May 13, 2004)

OPINION OF THE COURT

ALITO, Circuit Judge:

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* The Honorable Daniel M. Friedman, Senior Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

This is an appeal from an order of the District Court dismissing all of the claims asserted in the pro se complaint filed by Samuel T. Poole ("Poole"), an inmate. Poole's notice of appeal was not filed on time, apparently because of delay in receiving notice of the entry of the order dismissing his claims. Instead of moving to reopen the time to file an appeal under Rule 4(a)(6) of the Federal Rules of Appellate Procedure, Poole filed a notice of appeal shortly after finally receiving notice. We hold that we lack jurisdiction to entertain this appeal.

I.

This case concerns the paternity of a minor who Samuel T. Poole claims is his son. In 2001, Poole filed what he called a "Petition for a Writ of Habeas Corpus" against several public officials and private individuals, alleging that a series of actions taken in connection with two family law proceedings—one in Delaware and the other in Pennsylvania—violated his Fifth and Fourteenth Amendment rights by interfering with his access to his son. The District Court treated the case as an action filed under 42 U.S.C. § 1983 and permitted Poole to proceed *in forma pauperis*. The District Court then dismissed the claims against two defendants *sua sponte* for lack of personal jurisdiction, and the Court dismissed the claims against the remaining defendants as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

II.

A.

Before reaching the merits of this appeal, we are required to consider whether we have appellate jurisdiction. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). The timeliness of an appeal is a mandatory jurisdictional prerequisite. *United States v. Robinson*, 361 U.S. 220 (1960). In a civil case, Rule 4(a)(1) of the Federal Rules of Appellate

Procedure generally requires a notice of appeal to be "filed with the district clerk within 30 days after the judgment or order appealed from is entered." In this case, the order dismissing Poole's complaint was entered on March 26, 2002, and Poole deposited his notice of appeal in his prison's internal mail system 44 days later. Under Appellate Rule 4(c)(1), Poole's notice of appeal is regarded as having been filed upon mailing, but because he did not mail the notice of appeal within 30 days after the relevant order was entered, he did not comply with Rule 4(a)(1).

B.

Poole argues that his notice of appeal should be regarded as having been filed on time because there was a delay in his receipt of notice from the district court clerk's office regarding the entry of the order of dismissal. This delay resulted from Poole's transfer from one correctional institution to another shortly before the order of dismissal was entered. When Poole made his initial filing and until some time in late March 2002, he was incarcerated in the Delaware Correctional Center in Smyrna, Delaware. When the District Court entered the order dismissing Poole's claims, the clerk of the court apparently sent notice to Poole and all of the other parties on that same day. The notice to Poole was mailed to the facility in Delaware, but by the time it arrived, Poole had been transferred to Pennsylvania's State Correctional Institution at Graterford. The Postal Service returned the notice to the clerk on April 24, 2002, at which time the clerk faxed an "address request" to the Delaware Department of Corrections. The clerk received Poole's new address on April 29 and then mailed a copy of the order to the correct address. Poole received the order on May 6 and mailed his notice of appeal three days later.

Poole argues that handwritten letters that he sent to the District Court and that were received on March 22 and April 1 should have alerted the clerk to his transfer. The first letter was described on the docket sheets as "Letter to Clerk of the

Court dated 3/21/02 by Samuel Poole RE: questions regarding Habeas Corpus." This letter bore Poole's address at the Delaware facility, and in the midst of a discussion of other matters, the letter stated: "I will be returning to P.A. 3-24-02 is my Max out date and then my detainer come up . . . ."

The second letter was described in the docket sheets as "Letter by Plaintiff, received 4/1/02, advising the Court he has no pen, paper, or ability to make telephone calls." This handwritten note in its entirety states:

> Samuel T. Poole BN 5599
> Box 244
> Graterford Pa 19426-0244
>
> To: Clerk
>
> It will take me a couple of weeks to get a pen or to make a phone call or to get some paper this is the only way I can contact you with a pencil
>
> Thank you
>
> Samuel T. Poole

By the time this letter was sent and received, the clerk had already mailed notice to Poole's Delaware address, and apparently because this letter did not state expressly that Poole's address had changed and did not request that the clerk change the address listed on the docket, the letter did not alert the clerk's office that the notice sent a few days earlier had been mailed to a facility where Poole was no longer housed.

Poole argues that his notice of appeal should be regarded as having been filed on time under the reasoning of *United States v. Grana,* 864 F.2d 312 (3d Cir. 1989). In *Grana,* a criminal case, we held that, "in computing the timeliness of

filings which are jurisdictional in nature, any delay by prison officials in transmitting notice of a final order or judgment to an incarcerated *pro se* litigant should be excluded from the computation." *Id.* at 313. In the present case, Poole complains about delay attributable to the clerk's office, not prison officials, but Poole argues that *Grana* stands for the broad proposition that "when official delay . . . interferes with receipt of the notice of appeal, that delay 'must be subtracted from calculation of time for appeal.'" Appellant's Br. at 1 (quoting *Grana,* 864 F.2d at 316).

Poole's argument overlooks the significance of the fact that *Grana* was a criminal case. Because the present case is civil, the approach that we took in *Grana* is foreclosed by Federal Rule of Civil Procedure 77(d) and Federal Rule of Appellate Procedure 4(a). Under Civil Rule 77(d), a district court clerk must notify all parties not in default "[i]mmediately upon the entry of an order or judgment." The Rule goes on to state, however, that "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure." Appellate Rule 4(a), in turn, provides a procedure for reopening the time to file a notice of appeal when the party desiring to appeal does not receive notice of the entry of the judgment or order. In a civil case, therefore, the only way in which a party may obtain relief based on a clerk's failure to serve notice of the entry of a judgment or order is via Appellate Rule 4(a), not via the *Grana* approach.

The *Grana* approach remains viable[2] in criminal cases because the Federal Rules of Criminal Procedure do not

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[2] *Grana* was decided before Appellate Rule 4(a)(6) was added and corresponding changes were made in Civil Rule 77(d). However, because these changes do not apply to criminal cases, *Grana* was not affected.

contain any provision analogous to Civil Rule 77(d) and because Appellate Rule 4(b), which deals with appeals in criminal cases, does not contain any provision analogous to Appellate Rule 4(a)(6).[3] However, the *Grana* approach cannot be used to extend the time for filing a notice of appeal in a civil case.[4]

C.

1.

The remaining question that we must consider is whether there is any way in which Poole can obtain relief under Appellate Rule 4(a)(6). That Rule states:

> The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied: (A) the motion is filed within

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[3] The absence of criminal analogs to Fed. R. Civ. P. 77(d) and Fed. R. App. P. 4(a)(6) is probably due to the fact that the vast majority of orders in criminal cases from which a defendant may take an appeal are judgments of conviction and sentence. A criminal defendant must be present when sentenced, and consequently there is no need for the district court clerk to notify the defendant by mail regarding this occurrence. For the same reason, there are not many instances in which a criminal defendant runs the risk of failing to file a timely notice of appeal due to lack of notice regarding the entry of the order from which the appeal is taken. *Grana* was one of the relatively unusual criminal cases in which a defendant took an appeal from an order other than a judgment of conviction and sentence.

[4] Moreover, even if Civil Rule 77(d) and Appellate Rule 4(a) did not preclude us from applying *Grana* in the civil context, we would be reluctant to extend *Grana* to a case such as the present one, where the delay was not primarily due to Poole's status as an inmate but to the simple fact that he was moved. Although Poole argues that his letter of April 1 should have alerted the district court clerk that he had been transferred, neither of his letters expressly informed the clerk of that fact or requested that his address be changed in the court's records. It is simply asking too much of the district court clerk to note that the address listed on the April 1 letter was different from the address that Poole had previously provided.

> 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier; (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and (C) the court finds that no party would be prejudiced.

The terms of Appellate Rule 4(a)(6) thus contemplate the filing of a motion to reopen within seven days after notice is received. Here, Poole concedes that he received notice on May 6, 2002. He thus had until May 13 to move to reopen, but instead of filing a motion to reopen, he simply filed a notice of appeal on May 9. Unless we can construe his notice of appeal as a motion to reopen, he cannot qualify for relief under Appellate Rule 4(a)(6).

2.

Our court has not decided whether a pro se notice of appeal may be construed as a motion to reopen under Appellate Rule 4(a)(6), but we have held that a notice of appeal cannot be construed as a motion to extend the time to appeal in a civil case under Appellate Rule 4(a)(5). *Herman v. Guardian Life Insurance Co.*, 762 F.2d 288 (3d Cir. 1985) (per curiam). In *Herman,* we noted that before Appellate Rule 4(a)(5) was amended in 1979, we had been "'generally willing to treat a tardy notice of appeal as the substantial equivalent of a motion to extend the time for filing on the ground of excusable neglect.'" *Id.* at 289 (citation omitted). We held, however, that the 1979 amendment prevented us from continuing that practice. We noted that the first sentence of Fed. R. App. P. 4(a)(5) permits a district court to extend the time to file a notice of appeal "upon motion," and we observed: "Thus, the filing of a motion is expressly required to obtain an extension of time." *Id.* We also noted that the Committee Notes on the 1979 amendment to this provision stated that "'[t]he proposed amendment would

make it clear that a motion to extend the time must be filed no later than 30 days after the expiration of the original appeal time.'" *Id.* at 289-90 (quoting Appellate Rule 4(a)(5), Committee Notes, 1979 Amendments). We therefore held that an extension may not be granted under Appellate Rule 4(a)(5) unless a motion is filed.

Every other court of appeals to consider the question has reached the same conclusion. *See* 16A Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, and Patrick J. Schiltz, Federal Practice and Procedure § 3950.3 at 139 & n.11 (1999 & 2003 Supp.) (citing cases). Not only are these decisions supported by the language of Appellate Rules 4(a)(5) and 4(a)(6) and their Committee Notes, but the contrast with the provision of the Appellate Rules governing an extension of time to file a notice of appeal in a criminal case is striking. Appellate Rule 4(b)(4) expressly states that in criminal cases an extension may be granted "with or without motion."

3.

The reasoning of *Herman* and like cases from other circuits militates in favor of a similar interpretation of Appellate Rule 4(a)(6). The critical language in the two rules is not materially distinguishable. Appellate Rule 4(a)(5) states in relevant part:

> The district court may extend the time to file a notice of appeal *if . . . a party so moves* no later than 30 days after the time proscribed by this Rule 4(a) expires . . . .

(emphasis added). Appellate Rule 4(a)(6) contains similar language:

> The district court may reopen the time to file an appeal . . . *if . . . the motion is filed* within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the

> entry . . . .

(emphasis added). Likewise, the Committee Notes for the two provisions are hard to distinguish in the respect relevant here. The Notes on the 1979 amendments to Rule 4(a)(5) state:

> The proposed amendment would make it clear that *a motion to extend the time must be filed* no later than 30 days after the expiration of the original appeal time . . . .

(emphasis added).

The Notes on the 1991 amendments to Rule 4(a)(6) state:

> *Reopening may be ordered only upon a motion* filed within 180 days of the entry of a judgment or order or within 7 days of receipt of notice of such entry, whichever is earlier.

(emphasis added).

Because the decision in *Herman* was based on language in Appellate Rule 4(a)(5) and its Committee Note that is not significantly different from language in Appellate Rule 4(a)(6) and its Committee Note, we conclude that we should apply *Herman* in the present context as well. We therefore hold that Appellate Rule 4(a)(6) requires a motion to reopen. While "no particular form of words is necessary to render a filing a 'motion,'" *Campos v. LeFebvre,* 825 F.2d 671, 676 (2d Cir. 1987), a simple notice of appeal does not suffice.

We are aware that the Eleventh Circuit reached a contrary result in *Sanders v. United States,* 113 F.3d 184 (11th Cir. 1997) (per curiam). While acknowledging the similarity between the language of Appellate Rules 4(a)(5) and (6), *see id.* at 187 n.5, the *Sanders* panel gave several reasons for

interpreting the rules differently, but we do not find these reasons persuasive.

In part, the *Sanders* panel seems to have been influenced by a belief that parties who move for an extension under Rule 4(a)(5) are (as a group) less blameless than those (as a group) who move to reopen the time to appeal under Rule 4(a)(6).[5] This assessment of the relative blamelessness of the two groups is hardly clear cut. Parties who seek extensions under Rule 4(a)(5) are sometimes entirely blameless—for example, those who fail to file on time because of "an act of God or unforeseen human intervention." *Pioneer Inv. Serv. Co. v. Brunswick Associates Ltd. P'ship,* 507 U.S. 380, 388-89 (1993) (discussing "excusable neglect" under a bankruptcy rule). And parties who fail to file a timely notice of appeal because they have not received notice of the relevant judgment or order may not be entirely blameless[6]—for example, the party who is informed by the court that a dispositive order is expected within a week but does not thereafter make any effort to find out whether the order has been issued. In any event, assuming that there is some difference in the relative blamelessness of the two groups, the difference is far too slight to justify divergent interpretations of the very similar language of Rules 4(a)(5) and 4(a)(6).

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[5] The Court stated that "when through no fault of his own, a pro se litigant does not receive notice of the order from which he seeks to appeal, it would be unjust to deprive him of the opportunity to present his claim to this court." 113 F.3d at 187. The Court added that a "notice of appeal filed late because the appellant did not receive notice of the judgment should be treated differently (and more favorably) than those filed late for other reasons (i.e., those governed by Rule 4(a)(5)'s excusable neglect standard)." *Id.*

[6] Courts have faulted such parties for failing to make due inquiry about adverse judgments or orders. *See, e.g., O.P.M. Leasing Services Inc.*, 769 F.2d 911 (2d Cir. 1985) (party who was not served with notice under Civil Rule 77(d) faulted for not looking for notice of order in legal periodical).

The remaining reasons given in *Sanders* are likewise unconvincing. The *Sanders* Court stated that it had "a duty to liberally construe" a pro se litigant's submission, 113 F.3d at 187 (internal quotation and citation omitted), but this duty cannot justify taking a fundamentally different approach in interpreting filings under Rules 4(a)(5) and 4(a)(6).

Finally, we are not moved by the *Sanders* panel's argument that its interpretation of Rule 4(a)(6) is needed so that prison officials will not prevent inmates from taking timely appeals by ensuring that they do not receive notice of adverse decisions until after the time to appeal has expired. This argument is based on a hypothetical situation that is unlikely to arise with any frequency, if at all—namely, a case in which (a) prison officials risk the consequences of obstructing court mail in order to prevent a prisoner from appealing a district court decision that the prisoner has lost, (b) the prisoner learns of the decision within 180 days, but (c) instead of moving to reopen the time to appeal, the prisoner simply files a notice of appeal. We will not permit our interpretation of Rule 4(a)(6) to be governed by such an extreme hypothetical. If at some time in the future we are presented with such an outrageous case, we are confident that we have the tools to ensure that the right to appeal is not defeated.

In conclusion, we hold that relief under both Appellate Rules 4(a)(5) and 4(a)(6) requires the filing of a motion, not just a notice of appeal. We understand that this interpretation may lead to harsh results under both rules, and it may be that it would be preferable to treat a pro se notice of appeal as a motion under both rules. But we believe that Appellate Rules 4(a)(5) and 4(a)(6) must be read consistently, and thus we conclude that Rule 4(a)(6) demands a motion.

III.

Because Poole's Notice of Appeal was not timely filed and Poole failed to move to reopen the time to file an appeal, we lack jurisdiction to decide the merits of his appeal. Therefore, for the reasons set out above, this appeal is dismissed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SAMUEL T. POOLE, Plaintiff,	:	
v.	:	Civil Action No.01-297-JJF
FAMILY COURT OF NEW CASTLE COUNTY, LORETTA M. YOUNG, EMMA HAYES, FLORENCE F. WRIGHT JOHN W. NAILS, EDWARD J. ZETUSKY, JR., WALTER T. REDAVID, DELAWARE COUNTY BAR ASSOCIATION, AND JOHN DOE, Defendants.	:	

MEMORANDUM ORDER

Plaintiff, Samuel T. Poole, is a *pro se* litigant who is presently incarcerated at the Delaware Correctional Center ("DCC") located in Smyrna, Delaware. His SBI number is 337607. He filed this action pursuant to 42 U.S.C. § 1983 and requested leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915.

I. STANDARD OF REVIEW

Reviewing complaints filed pursuant to 28 U.S.C. § 1915 is a two step process. First, the Court must determine whether Plaintiff is eligible for pauper status. The Plaintiff filed this action on May 4 , 2001. The Court granted

Plaintiff leave to proceed *in forma pauperis* on June 5, 2001 and ordered him to pay $10.95 as an initial partial filing fee within thirty days. Plaintiff paid the initial partial filing fee on June 12, 2001.

Once the pauper determination is made, the Court must then determine whether the action is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant immune from such relief pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).[1] If the Court finds Plaintiff's Compliant falls under any one of the exclusions listed in the statutes, then the Court must dismiss the Complaint.

When reviewing complaints pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1), the Court must apply the standard of review set forth in Fed. R. Civ. P. 12(b)(6). *See Neal v. Pennsylvania Bd. of Probation and Parole*, No. 96-7923, 1997 WL 338838 (E.D. Pa. June 19, 1997) (applying Rule 12(b)(6) standard as appropriate standard for dismissing claim under § 1915A). Accordingly, the Court must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." *Nami v. Fauver,* 82 F.3d 63, 65 (3d Cir. 1996). *Pro se* complaints are held to "less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Estelle v. Gamble*, 429 U.S. 97, 106

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[1] These two statutes work in conjunction. Section 1915(e)(2)(B) authorizes the court to dismiss an *in forma pauperis* complaint at any time, if the Court finds the complaint is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant immune from such relief. Section 1915A(a) requires the Court to screen prisoner *in forma pauperis* complaints seeking redress from governmental entities, officers or employees before docketing, if feasible and to dismiss those complaints falling under the categories listed in § 1915A(b)(1).

(1976) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

The standard for determining whether an action is frivolous is well established. The Supreme Court has explained that a complaint is frivolous "where it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).[2] As discussed below, Plaintiff's claims have no arguable basis in law or in fact and shall be dismissed as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

II. BACKGROUND

1. Plaintiff's Pending Motions

Along with the Complaint, Plaintiff has filed the following five–motions: 1) Motion for Appointment of Counsel (D.I. 2); 2) Motion for Discovery and Inspection (D.I. 3); 3) Motion for Temporary Restraining Order (D.I. 21); 4) Motion to Compel Discovery (D.I. 23); and 5) Motion for Default (D.I. 28). Because the Court finds that the Plaintiff's claims frivolous, Plaintiff's Motion for Appointment of Counsel, Motion for Discovery and Inspection, Motion for Temporary Restraining Order and Motion to Compel Discovery shall be denied as moot.

Furthermore, judgment by default is appropriate when the party against whom the judgment is sought has "failed to plead or otherwise defend" against the complaint as provided by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 55(a). Because Plaintiff filed the Complaint pursuant to 28

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[2] *Neitzke* applied § 1915(d) prior to the enactment of the Prisoner Litigation Reform Act of 1995 (PLRA). Section 1915(e)(2)(B) is the re-designation of the former § 1915(d) under the PLRA. Therefore, cases addressing the meaning of frivolousness under the prior section remain applicable. *See* § 804 of the PLRA, Pub. L. No. 14-134, 110 Stat. 1321 (April 26, 1996).

U.S.C. § 1915, service of process must be made by the United States Marshal, as directed by the Court. *See* Fed. R. Civ. P. 4(c)(2). The Court has not yet directed the United States Marshal to serve the Complaint in this case. Consequently, the Defendants have not "failed to plead or otherwise defend" against the Complaint. Therefore, Plaintiff's Motion for Default shall be denied.[3]

2. Plaintiff's "Motion to Supplement"

Plaintiff initially filed this complaint naming "John Doe" as one of the Defendants. On January 30, 2002, Plaintiff filed a "Motion to Supplement the Complaint" (D.I. 25) in which he identified Defendant "John Doe" as Loretta M. Young and expanded upon his claims. Under Fed. R. Civ. P. 15(a) a plaintiff may amend his complaint once as a matter of course at any time before a responsive pleading is served. As this case has not been served on the Defendants, the Court construes the "Motion to Supplement the Complaint" simply as Plaintiff's Amended Complaint. The Clerk shall amend the docket, replacing "John Doe" with Loretta M. Young. An amended complaint filed as a matter of course or after leave of the court supercedes the original complaint. *See Young v. City of Mount Ranier*, 238 F.3d 567 (4th Cir. 2001) (quoting *In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 162 (2d Cir. 2000)); *Hal Roach Studios, Inc. v. Richard Feiner, & Co. Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1990); *Fritz v. Standard Sec. Life Ins. Co. of New York*, 676 F.2d 1356, 1358 (11th Cir. 1982); Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1476 (2d ed 1990). ("A pleading that has been amended ... Supersedes the pleading it modifies ... Once an amended pleading is interposed, the original pleading no

[3] Plaintiff served the Motion for Default on Defendant Nails on February 2, 2002 and Kathleen N. Miller has entered an appearance on Defendant Nails' behalf. The Court shall direct the Clerk to mail a copy of the Memorandum Order to Defendant Nails' counsel.

longer performs any function in the case . . .''). Consequently, the Court reviews only the Amended Complaint filed on January 30, 2002.

III. DISCUSSION

Although the Plaintiff attempts to set out his claims in chronological order, the Amended Complaint often does not make sense. Nonetheless, the Court has attempted to sort out Plaintiff's claims.[4] First, Plaintiff alleges that sometime in 1996, Defendant Young presided over a paternity suit involving the minor child Samuel J. Poole ("Samuel") born on December 7, 1995. (D.I. 25 at 9) Plaintiff alleges that he is Samuel's biological father and that his name appeared on Samuel's birth certificate. (*Id.* at 2) Plaintiff further alleges that at this hearing, defendants Young and Hayes pressured Sherrilyn Connor, ("Connor"), Samuel's mother, into naming Norman Hayes as Samuel's biological father. Plaintiff further alleges that Young then entered an order amending Samuel's birth certificate. Plaintiff appears to be alleging that the hearing was held in violation of his rights under the Fourteenth Amendment, as he was not notified and given an opportunity to respond. (*Id.*)

Second, Plaintiff appears to be alleging that sometime in 1999 Defendant Emma Hayes ("Hayes") obtained a custody order from a Pennsylvania court in violation of Plaintiff's rights. (*Id.* at 3) Furthermore, Plaintiff alleges Defendant Hayes obtained this order in a conspiracy with Defendant Wright, who appears to be a Master appointed by the Delaware County Court of Common Pleas. (*Id.* at 3) Plaintiff further alleges that Connor contested this custody order and had it amended. (*Id.* at 4) Plaintiff contends that

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[4] Plaintiff has named the Family Court of New Castle County, the Delaware County Bar Association and John Doe as defendants in his complaint. However, the Court has not discerned any specific allegations against these defendants.

Connor was again forced to name Norman Hayes as Samuel's biological father. (*Id.*)

Third, Plaintiff alleges that Defendant Hayes now has custody of Samuel, although it is not clear when or how Hayes obtained custody. (*Id.* at 5-6) Plaintiff further alleges that Hayes is harming Samuel, by giving him a "controlled substance." (*Id.*) Plaintiff provides no other information in support of this allegation. Next, Plaintiff seems to be alleging that Defendant Zetusky, who appears to be a judge on the Delaware County Court of Common Pleas, awarded Defendant Hayes custody of Samuel, thus violating Plaintiff's constitutional rights. (*Id.* at 17)

Finally, Plaintiff alleges that Defendants Nails and Redavid provided ineffective assistance of counsel to Plaintiff, his mother and Connors, in their attempts to maintain custody of Samuel. (*Id.* at 14-16) Plaintiff requests that he be awarded unspecified compensatory and punitive damages from each Defendant. (*Id.* 9-17)

B. Analysis

1. Personal Jurisdiction

Both Defendants Wright and Zetusky appear to be employed by the Delaware County Court of Common Pleas and residents of the Commonwealth of Pennsylvania. In order to assert personal jurisdiction over out of state defendants, the Court must engage in a two step analysis. First, the Court must decide whether the State of Delaware long arm statute authorizes the Court to assert jurisdiction over these defendants. Second, the Court must determine whether exercising jurisdiction comports with the requirements of the Due Process Clause of the Fourteenth Amendment. *See Steelman v. Carper*, 124 F. Supp. 2d 219, 222 (D. Del. 2000) (citing *Compaq Computer Corp. v. Packard Bell Elec. Inc.*, 948 F. Supp. 338, 342 (D. Del. 1996)).

It appears that the visitation and custody determinations allegedly made by Defendants Wright and Zetusky occurred outside the State of Delaware. Plaintiff has not alleged that either of these defendants "regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from its services or things used or consumed in the State." Del. C. Ann. tit. 10 § 3104(c)(4). Nor has Plaintiff established that Defendants Wright and Zetusky have sufficient "minimum contacts" with the State of Delaware to meet the "traditional notions of fair play and substantial justice" the Due Process Clause of the Fourteenth Amendment requires when a court exercises personal jurisdiction over an out of state resident. *See International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1948). Consequently, Plaintiff's claims against Defendants Wright and Zetusky shall be dismissed for lack of personal jurisdiction.

2. Statute of Limitations

Plaintiff's Fourteenth Amendment claim against Defendant Young and his conspiracy claim against Defendant Hayes are time-barred by the statute of limitations. The Supreme Court has determined that § 1983 claims should be characterized as personal injury actions for statute of limitations purposes. *See Wilson v. Garcia*, 471 U.S. 261 (1985). "Limitations periods in § 1983 suits are to be determined by reference to the to the appropriate 'state statute of limitations and the coordinate tolling rules.'" *Hardin v. Straub*, 490 U.S. 536, 541 (1989) (citing *Board of Regents of Univ. of New York v. Tomanio*, 446 U.S. 478, 484 (1980)). However, accrual of such claims are governed by federal law. *See Albright v. Oliver*, 510 U.S. 266, 280 n. 6 (1994) (Ginsburg, J. concurring). The relevant state statute of limitations for a personal injury action in Delaware is two years. *See Del. Code Ann.* tit. 10 § 8119; *Carr v. Town of Dewey Beach*, 730 F. Supp. 591 (D. Del. 1990).

Consequently, Plaintiff's claim against Defendants Young and Hayes accrued, when he knew or had reason to know of the injury that forms the basis of each claim. *Carr*, 730 F. Supp. at 601. It appears that Plaintiff knew the outcome of the paternity hearing in 1996. Even if Plaintiff did not know the outcome of the paternity hearing in 1996, he knew of it by at least April 21, 1999, the date Defendant Wright awarded visitation to Hayes. Plaintiff did not file this action until May 3, 2001, more than two years after the latest date his claim could have accrued.

Because the statute of limitations is an affirmative defense ordinarily subject to waiver, *sua sponte* dismissal on this ground raises concerns of procedural fairness. However, prior to the enactment of the PLRA, several federal courts concluded that *in forma pauperis* claims which were time-barred were properly dismissed *sua sponte* as frivolous under 28 U.S.C. § 1915(d). *See e.g. Gartrell v. Gaylor*, 981 F.2d 254, 256 (5th Cir. 1993) ("Where it is clear from the face of the complaint filed *in forma pauperis* that the claims asserted are barred by the applicable statute of limitations, those claims are properly dismissed pursuant to § 1915(d)"); *Myers v. Vogal*, 960 F.2d 750, 751 (8th Cir. 1992) ("Although the statute of limitation is an affirmative defense, a district court may properly dismiss an *in forma pauperis* complaint under 28 U.S.C. § 1915(d) when it is apparent the statute of limitations has run.") (*per curiam*); *Street v. Vose*, 936 F.2d 38, 39 (1st Cir. 1991) (*per curiam*); *Clark v. Georgia Pardons and Paroles Bd.*, 915 F.2d 636, 640 n.2 (11th Cir. 1990).

With the enactment of the PLRA, § 1915(e) not only retained the language of the former § 1915(d), it also added new provisions requiring the dismissal of *in forma pauperis* actions "at any time" if the district court finds the claims to be "frivolous, malicious, or for failure to state a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B). Thus, the *sua sponte* dismissal of clearly time-barred claims

is not only appropriate, but required under the PLRA. *See Johnstone v. United States*, 980 F. Supp. 148, 154 (E.D. Pa. 1997) ("When a complaint on its face shows that the action was filed outside of the applicable limitations period, and the court has satisfied itself that no legal rule tolls or otherwise abrogates the limitations period, *sua sponte* dismissal is appropriate under § 1915."). It is clear from the face of the complaint, that Plaintiff's claims against Defendants Young and Hayes were filed outside the two year limitations period and "no legal rule tolls or otherwise abrogates the limitations period." *Id.* Plaintiff's claims against Defendants Young and Hayes have no arguable basis in law or in fact. Therefore, Plaintiff's claims against Defendants Young and Hayes shall be dismissed as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

3. State Action Required in § 1983 Actions

Plaintiff's claims against Defendants Nails and Redavid also fail. To state a claim under 42 U.S.C. § 1983, Plaintiff must allege "the violation of a right secured by the Constitution or laws of the United States and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988) (citing *Parratt v. Taylor*, 451 U.S. 527, 535 (1981) (overruled in part on other grounds *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986)). To act under "color of state law" a Defendant must be "clothed with the authority of state law." *West*, 487 U.S. at 49. It is clear from the Complaint that Defendants Nails and Redavid are both attorneys engaged in the private practice of law. It appears that at some point in time, each Defendant was hired to represent either Plaintiff, Connor or Plaintiff's mother in their custody dispute with Hayes. Neither of these defendants have acted under "color of state law." Plaintiff's claims against defendants Nails and Redavid have no arguable basis in law or in fact. Therefore, Plaintiff's claims against these

Defendants shall be dismissed as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

NOW THEREFORE, at Wilmington this 26 day of March, 2002, IT IS HEREBY ORDERED that:

1. The Clerk of the Court shall amend docket by removing "John Doe" and adding Loretta M. Young as a defendant.

2. Plaintiff's claims against Defendants Wright and Zetusky are DISMISSED for lack of personal jurisdiction.

3. Plaintiff's claims against Defendants Young and Hayes are DISMISSED as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

4. Plaintiff's claims against Defendants Nails and Redavid are DISMISSED as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

5. Plaintiff's Motion for Appointment of Counsel (D.I. 2) is DENIED as moot.

6. Plaintiff's Motion for Discovery and Injunction (D.I. 3) is DENIED as moot.

7. Plaintiff's Motion for Temporary Restraining Order (D.I. 21) is DENIED as moot.

8. Plaintiff's Motion to Compel Discovery (D.I. 23) is DENIED as moot.

9. Plaintiff's Motion for Default (D.I. 28) is DENIED.

10. The Clerk of the Court shall mail a copy of this Memorandum Order forthwith to the Plaintiff and Kathleen Miller.

/s/ Joseph J. Farnan, Jr.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

02-2364

SAMUEL T. POOLE,

Appellant

v.

FAMILY COURT OF NEW CASTLE COUNTY; JOHN DOE; EMMA HAYES; FLORENCE F. WRIGHT, ESQ.; JOHN W. NAILS, ESQ.; EDWARD J. ZETUSKY, Jr.; WALTER T. REDAVID, ESQ., Judge; DELAWARE COUNTY BAR ASSOCIATION; ROBERT SNYDER, Warden; ATTORNEY GENERAL OF THE STATE OF DELAWARE; LORETTA M. YOUNG

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, FISHER, and FRIEDMAN, *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for

rehearing by the court en banc, the petition for rehearing is denied. Judge Friedman would have granted panel rehearing.

By the Court,

/s/ Samuel A. Alito, Jr.
Circuit Judge

DATED: June 8, 2004
tyw/cc: Charles R.A. Morse, Esq.
Stuart B. Drowos, Esq.
Kathleen M. Miller, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

02-2364

SAMUEL T. POOLE,

Appellant

v.

FAMILY COURT OF NEW CASTLE COUNTY; JOHN DOE; EMMA HAYES; FLORENCE F. WRIGHT, ESQ.; JOHN W. NAILS, ESQ.; EDWARD J. ZETUSKY, Jr.; WALTER T. REDAVID, ESQ., Judge; DELAWARE COUNTY BAR ASSOCIATION; ROBERT SNYDER, Warden; ATTORNEY GENERAL OF THE STATE OF DELAWARE; LORETTA M. YOUNG

AMENDED ORDER
SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, FISHER, *Circuit Judges* and FRIEDMAN*, *Senior Circuit Judge*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other

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* As to panel rehearing only.

available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Samuel A. Alito, Jr.
Circuit Judge

DATED: June 15, 2004
tyw/cc: Charles R.A. Morse, Esq.
Stuart B. Drowos, Esq.
Kathleen M. Miller, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

02-2364

SAMUEL T. POOLE,

Appellant

v.

FAMILY COURT OF NEW CASTLE COUNTY; JOHN DOE; EMMA HAYES; FLORENCE F. WRIGHT, ESQ.; JOHN W. NAILS, ESQ.; EDWARD J. ZETUSKY, Jr.; WALTER T. REDAVID, ESQ., Judge; DELAWARE COUNTY BAR ASSOCIATION; ROBERT SNYDER, Warden; ATTORNEY GENERAL OF THE STATE OF DELAWARE; LORETTA M. YOUNG

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

(Dist. Court No. 01-cv-00297)
District Court Judge: Hon. Joseph J. Farnan, Jr.

Argued: December 2, 2003

Before: SLOVITER, ALITO, and FRIEDMAN,*
Circuit Judges

JUDGMENT

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* The Honorable Daniel M. Friedman, Senior Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

This cause came to be heard on the record from the United Sates District Court for the District of Delaware and was argued on December 2, 2003.

On consideration whereof, it is not here ordered and adjudged by this Court that the appeal of the order of the District Court entered on March 26, 2001, be and the same is DISMISSED for lack of jurisdiction. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

DATED: May 13, 2004

Certified as a true copy and issued in lieu
of a formal mandate on 6/16/04

Teste: /s/ Marcia M. Waldron
Clerk, U.S. Court of Appeals for the Third Circuit

FEDERAL RULES OF APPELLATE PROCEDURE RULE 4, 28 U.S.C. APPENDIX

TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of

Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;

(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

S.D.N.Y.
91-cv-5774
Leisure, J.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of May one thousand nine hundred and ninety-four,

Julio Martinez, Petitioner-Appellant, v. Charles Scully, Superintendent of Green Haven Correctional Facility; Robert Abrams, New York State Attorney General; and Robert M. Morgenthau, District Attorney, New York County, Respondents-Appellees.	United States Court of Appeals Second Circuit Filed May 6, 1994 George Lange III, Clerk 94-2190

A notice of appeal having been filed by appellant on February 4, 1994, it is ordered that this case be remanded to the United States District Court for the Southern District of New York (Leisure, J.) to determine when petitioner received a copy of the judgment and to treat appellant's

notice of appeal as a motion to extend the time for appeal under Fed. R. App. Proc. 4(a)(6).

/s/ J. Edward Lumbard per FXA

/s/ Francis X. Altimari

/s/ John M. Walker
Circuit Judges

FXA JEL JMW

May 6, 1994

MANDATE

N.D.N.Y.
95-cv-1575
Pooler, J.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

U.S. DISTRICT COURT
N.D. OF N.Y.
FILED
APRIL 1, 1996

GEORGE A. RAY, Clerk
UTICA

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-second day of March one thousand nine hundred and ninety-six,

Donald N. Powless, Plaintiff-Appellant, v. James G. Grose, et al., Defendants-Appellees.	United States Court of Appeals Second Circuit Filed March 22, 1996 George Lange III, Clerk 96-2091

This Court having determined *sua sponte* that it lacks jurisdiction over this appeal because the notice of appeal is untimely pursuant to Rule 4(a)(1) of the Federal Rules of

Appellate Procedure, it is ordered that said appeal be and it hereby is dismissed. The district court is instructed to construe the appellant's notice of appeal as a motion to reopen the time for appeal pursuant to Fed. R. App. P. 4(a)(6).

/s/ Richard J. Cardmone (per JMW)

/s/ John M. Walker

/s/ Joseph L. McLaughlin (per JMW)
Circuit Judges

A TRUE COPY
GEORGE LANGE III, CLERK

/s/ George Lange III

JMW RJC JMcL

Mandate Issued: March 22, 1996

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
APRIL 17, 2000
RALPH L. DeLOACH, Clerk
By /s/ _____ Deputy

	92-20063-01
UNITED STATES OF AMERICA,	
	No. 99-3357
Plaintiff-Appellee,	
	A true copy
v.	
	Patrick Fisher Clerk, U.S. Court of
LEALON MULDROW,	Appeals, Tenth Circuit
Defendants-Appellant.	/s/ _____ Clerk

ORDER

Filed April 13, 2000

Before **BRORBY, KELLY,** and **HENRY**, Circuit Judges.

Defendant Lealon Muldrow, a federal prisoner, appeals the district court order entered June 17, 1998 denying his 28 U.S.C. § 2255 motion.

This appeal is jurisdictionally defective. Under Fed. R. App. P. 4(a)(1)(B), the sixty-day deadline for the filing of a

timely notice of appeal expired on Monday, August 17, 1998. *See* Fed. R. App. P. 26(a). The certificate of service attached to Defendant's notice of appeal contains a date of October 22, 1999. Pursuant to the prisoner mailbox rule, *see* Fed. R. App. 4(c); *Houston v. Lack*, 487 U.S. 266, 275-76 (1988), the notice of appeal is deemed filed as of October 22, 1999, which is approximately fourteen months after expiration of the sixty-day filing deadline.

Defendant argues that the sixty-day deadline for filing his appeal did not begin to run until October 20, 1999, the date he claims he received a copy of the district court order entered June 17, 1998. This argument was considered and rejected in *Jenkins v. Burtzloff*, 69 F.3d 460 (10th. Cir. 1995). In *Jenkins*, this court held that the time period for filing an appeal begins to run on the date of entry of the order, and not the date the prisoner first receives a copy of the order. *Id.* at 461. Compliance with filing requirements is mandatory and jurisdictional. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988). Defendant's appeal is untimely, and this court lacks appellate jurisdiction.

Defendant states in his notice of appeal that he did not know the district court had entered an order denying his § 2255 motion until October 13, 1999 when he called the district court clerk's office. He further states that he received a copy of the order on October 20, 1999. Plaintiff United States of America in its jurisdictional memorandum brief states that "the district court's docket sheet lends some credibility to [Defendant's] claim" that he did not receive a copy of the district court order denying his § 2255 motion until October 20, 1999. The court appreciates Plaintiff's candor.

Defendant Muldrow's situation may fall within the scope of Fed. R. App. P. 4(a)(6). *See generally Avolio v. County of Suffolk*, 29 F.3d 50, 51-54 (2nd Cir. 1994) (sets forth scope and application of Rule 4(a)(6)). Because Defendant recognizes he has a timeliness problem, we liberally construe

his notice of appeal as a motion under Fed. R. App. P. 4(a)(6). *See Haines v. Kerner*, 404 U.S. 519, 520 (1972).

The appeal is DISMISSED for lack of jurisdiction. The case is REMANDED to the district court for a determination of whether the time period for filing a notice of appeal should be reopened for fourteen days pursuant to Fed. R. App. P. 4(a)(6). The mandate will issue forthwith.

Entered for the Court,
Patrick Fisher, Clerk

IN THE UNITED STATES COURT OF APPEAL
FOR THE THIRD CIRCUIT

SAMUEL T. POOLE, Appellant	:	CIVIL ACTION
	:	Civil Action
V.	:	No. 01-297-JJF
FAMILY COURT OF NEW CASTLE COUNTY, LORETTA M. YOUNG, EMMA HAYES, FLORENCE F. WRIGHT, JOHN W. NAILS, EDWARD J. ZETUSKY, JR., WALTER T. REDAVID, DELAWARE COUNTY BAR ASSOCIATION, and JOHN DOE, Defendants	:	

NOTICE OF APPEAL

Notice is hereby given that Samuel T. Poole, Petitioner/Appellant in the above-entitled matter, does appeal to the United States Court Of Appeals For The Third Circuit from the ORDER of Judge Joseph J. Farnan, Jr., entered in this action on March 26, 2002 (which Petitioner/Appellant came into receipt of dated May 6, 2002).

Respectfully submitted,

By: /s/ Samuel T. Poole
Samuel T. Poole BN-5599
SCI-Graterford
Box 244
Graterford, PA. 19426-0246
Petitioner/Appellant pro se

DATED: May 9, 2002